(34)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 332

IRVING K. HUTCHINSON, ET. AL.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,
Respondents.

PETITION OF IRVING K. HUTCHINSON, ET AL., FOR WRIT OF CERTIORARI.

AND

MOTION TO CONSOLIDATE WITH THE PEOPLE, EX REL. RECONSTRUCTION FINANCE CORPORATION vs. BOARD OF EDUCATION OF THE CITY OF CHICAGO.

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
Attorneys for Petitioners,
11 South La Salle Street,
Chicago 3, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

Table of Cases.

Constitution and Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. .....

IRVING K. HUTCHINSON, ET. AL.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.,

Respondents.

PETITION OF IRVING K. HUTCHINSON AND OTHERS FOR WRIT OF CERTIORARI

and

MOTION TO CONSOLIDATE WITH THE PEOPLE, EX REL. RECONSTRUCTION FINANCE CORPORATION, vs. BOARD OF EDUCATION OF THE CITY OF CHICAGO.

To the Honorable the Supreme Court of the United States:

Irving K. Hutchinson and 211 other judgment creditors of the Board of Education of the City of Chicago, Illinois, respectfully pray that a writ of certiorari be directed to the Supreme Court of Illinois, directing that Court to certify to this Court the record in the case of *Irving K. Hutchinson, et al.* v. *Board of Education of the City of Chicago, et al.*, No. 27490 in that Court, in order that the decision and judgment of said Court rendered May 11,

1944, in the consolidated appeal entitled *City Bank and Trust Company* v. *Board of Education*, 386 Ill. 508, 54 N. E. (2d) 498, may be reviewed by this Court, and the judgment reversed.

Summary Statement of Matter Involved.

April 15, 1938, Irving K. Hutchinson and 211 other holders and owners of unpaid tax anticipation warrants issued by the Board of Education of the City of Chicago, Illinois against its 1929 tax levies, obtained money decrees in a suit for accounting against said Board of Education for their respective pro rata shares of the proceeds of collections of the taxes against which said warrants were issued which were received into the treasury of said Board of Education. (R. 133-176.) No appeal was taken from the decree entered in the suit in which these judgment creditors were joint plaintiffs, and the decree stands unmodified and unreversed. November 19, 1942, the Board of Education filed a motion to vacate the decree and to dismiss the suit on the ground that the Supreme Court of Illinois in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2d) 497, had decided that another decree entered against the Board of Education on identically the same theory and facts as petitioners' decree was void. (R. 176-183.) The motion to vacate and to dismiss was denied (R. 182), and the Board of Education appealed to the Supreme Court of Illinois. (R. 183.) That Court held that the decision in the second appeal in *Leviton* v. *Board of Education*, 385 Ill. 599, 53 N. E. (2d) 596, (which case is also before this Court on petition for writ of certiorari in *Lewis* v. *Board*), was tantamount to a decision that neither the final decree in petitioners' accounting suit nor identical decrees in other accounting suits, created any liability against the Board of Education and could not be paid by it under the

Illinois Constitution (R. 193-194), and that therefore the questions presented by the consolidated appeal had become moot, and it dismissed the appeals. (R. 196.) The opinion of the Supreme Court of Illinois is reported in *City Bank and Trust Co., et al. v. Board of Education*, 386 Ill. 508, 54 N. E. (2d) 498, and is printed in full at pages 185 to 196 of the record.

Statement of Jurisdictional Grounds.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code. 28 U. S. C. Sec. 344(b).

This cause is one of several which originated in the Circuit Court and the Superior Court of Cook County, Illinois, for an accounting by the Board of Education of the City of Chicago, Illinois, and the order entered in this case denying the motion to vacate the final decree entered and to dismiss the suit was reviewed on appeal by the Supreme Court of Illinois. Neither the Circuit Court nor the Superior Court filed an opinion. The judgment of the Supreme Court was entered March 21, 1944 (R. 197), but a petition for rehearing was filed in apt time (R. 198), and the judgment became final on May 11, 1944, on which day the petition for rehearing was denied. (R. 207.)

It is claimed that this Court has jurisdiction to review the judgment of the Circuit Court because the Supreme Court of Illinois failed or refused to adjudicate the rights of petitioners claimed by them under Section 1 of Amendment XIV of the Constitution of the United States and disposed of the case upon non-federal grounds which were unsubstantial and untenable or which were not of such nature and character as to serve as sufficient grounds of decision independent of the federal questions.

It is claimed by petitioners that their decree, still standing as it does, final, unvacated and unmodified, is property

which is protected by the Fourteenth Amendment, that an essential attribute of the decree is the right to enforce it by any remedy normally afforded by the law to enforce any decree against a municipal body, and that the refusal of the Supreme Court of Illinois, to enforce the decree for reasons other than want of jurisdiction to enter the decree on the part of the court which entered it, has been to deprive petitioners of their property in their decrees and to destroy those decrees without due process of law and to deny them equal protection of the laws in violation of Section 1 of Amendment XIV of the Constitution of the United States. The Supreme Court of Illinois failed or refused to pass upon these questions, and thereby deprived petitioners of their privilege to have their claim of federal constitutional right judicially determined.

It is claimed by petitioners that the Supreme Court of Illinois was without power and authority to re-examine the propriety of the decree as respects the nature of the causes of action and claims which the decree conclusively adjudicated in favor of petitioners, usurped judicial power in so doing, and thereby deprived petitioners of their property without due process of law and denied to them equal protection of the law.

It is claimed by petitioners that the denial to them by the Supreme Court of Illinois of the right to enforce their decree is to permit the Board of Education to take or destroy or give to another the private property of petitioners received by the Board to petitioners' use without compensation to them, in violation of Section 1 of Amendment XIV of the Federal Constitution.

It is claimed by petitioners that the Supreme Court of Illinois applied as binding upon petitioners a judgment and decision entered in a case to which they were not parties and in which they were not represented, thereby de-

priving them of their day in court and of due process of law.

Where the State court says in its opinion that the property rights of the litigant are determined by the decision in another case of like character, as it did in this case, and holds that the decrees are unenforceable, the fact that it enters a judgment dismissing the appeal on the ground that the questions presented have become moot does not avoid the jurisdiction of this Court where a title or right of the litigant, specifically claimed in the State court under the Constitution of the United States, is denied by the State court. Regard must be had to substance and not just to form to assure due process.

Statement of When and How the Federal Jurisdictional Questions Were Raised and What Disposition Was Made of Them.

Other than the original pleadings on which the decree in the accounting suit was entered, the only pleading before the Circuit Court of Cook County on the proceedings to vacate petitioners' decree and dismiss the accounting suit was the motion of the Board of Education. (R. 176-182.) Pursuant to the Illinois practice, petitioners orally advanced the grounds upon which they contended the motion of the Board of Education should be denied. The Circuit Court filed no opinion in connection with its order and judgment denying the motion of the Board of Education.

In their brief in the Supreme Court of Illinois* in sup-

* The briefs filed by the parties in the Supreme Court of Illinois have been certified to this Court. The practice of making formal assignments of error on the record on appeal does not obtain in Illinois. Instead, the grounds of appeal and questions sought to be raised on appeal are required to be set forth clearly in the briefs of the parties. It is sufficient if the grounds upon which an appellee seeks to sustain the judgment below appear from an examination of the entire brief. *Swain* v. *Hoberg*, 380 Ill. 442, 44 N. E. (2d) 38.

port of the order of the Circuit Court denying the Board's motion petitioners urged and argued, among others, the propositions:

(1) The decree became final thirty days after its entry, was conclusive of all questions which were or could have been presented in the proceeding in which it was entered, and jurisdiction and judicial power was thereupon lost to vacate or amend it for the purpose of correcting any alleged error involving the merits of the case. (Brief, pp. 10, 15, 18, 19, 20, 33.)

(2) The sole issue open for decision on the appeal was whether petitioner's decree was valid and therefore enforceable, and this issue was to be determined by the limited inquiry as to whether the decree was entered by a court of competent jurisdiction in adversary proceedings upon appropriate pleadings and after full hearing, and whether the time within which a court had power and jurisdiction to vacate or modify the decree had elapsed. (Brief, pp. 10, 11-14, 15-47.)

(3) Petitioners had a vested property right in their decree and the vacation of that decree on any grounds other than lack or abuse of jurisdiction on the part of the court which entered it, would deprive petitioners of their property without due process of law in violation of Section 1 of Amendment XIV of the Constitution of the United States. (Brief, pp. 10, 48.)

(4) Any attempt to apply to the decree the decision and judgment of the Supreme Court of Illinois in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2d) 497, to which proceeding none of these petitioners was a party and in which their decree was not involved, would be to adjudicate the rights of petitioners without a hearing and to deny to them due process of law, contrary to Section 1 of Amendment XIV of the Constitution of the United States. (Brief, pp. 47, 48.)

The Supreme Court of Illinois failed to pass upon any of the foregoing federal constitutional questions specifically claimed in petitioners' brief. (R. 185-196.) It held that

all questions presented were moot and dismissed the appeal on the ground that the prior decision of the Court in *Leviton* v. *Board of Education*, 385 Ill. 599, 53 N. E. (2d) 596, was tantamount to a decision that although the decree was a decree of record it created no liability against the board of education, and could not be paid by it under the Illinois Constitution, (R. 193,) and that as a consequence the decision of the Court on the question of whether the Circuit Court was right or wrong in denying the motion of the Board of Education to vacate the decree would afford no effective relief to either party to the decree, thus rendering all questions purely academic and abstract. (R. 193, 195, 196.)

The ground of decision that the questions presented on the record were academic, abstract and moot was injected into the case for the first time in the opinion of the Supreme Court of Illinois. This ground of decision could not be and was not anticipated by the parties. *Leviton* v. *Board of Education*, 385 Ill. 599, 53 N. E. (2d) 596, the decision which the Court held to be tantamount to a holding that petitioners' decree could not be enforced and which the Court regarded as having rendered moot all questions in the case at bar, was not decided until several months, (January 20, 1944,—R. 237, in *Lewis* v. *Board*) after the case at bar was submitted to and taken under advisement on September 24, 1943. (R. 184.)

Nor could the petitioners anticipate that in the absence of a holding that the decree was void for want of jurisdiction in the court which entered it, the Supreme Court of Illinois would deny petitioners the right, theretofore afforded to all holders of final, valid judgments against municipal bodies, to enforce their decrees by the usual remedies. Prior to the time of its decision in the case at bar, the Supreme Court of Illinois had held without a single exception that a final decree entered by a court of

competent jurisdiction was in itself conclusive of the right of the judgment creditor to receive payment and of the judgment debtor to take all steps necessary to bring about such payment.

In their petition for rehearing petitioners claimed that the Court by its decision had denied them rights granted to them by Section 1 of Amendment XIV of the Constitution of the United States. In support of their claim petitioners pointed out:

(a) That the Court had overlooked and misapprehended the claims of federal constitutional rights asserted in petitioners' brief. (R. 200.)

(b) That the failure or refusal of the Court to pass upon the validity of petitioners' decree and upon the merits of the case presented by the record on appeal, had condemned their decrees without a hearing and thereby denied them due process of law. (R. 205, 206.)

(c) By dismissing the appeal, the Court, while leaving the decree standing on the record of the Circuit Court of Cook County, destroyed the property rights of petitioners in their decree by holding the decree was not a corporate obligation of the Board of Education and could not be enforced against it. (R. 206.)

(d) That the attempt of the Court to apply its judgment in *Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2d) 497, as binding upon petitioners deprived them of their day in court and denied them due process of law. (R. 205-6.)

(e) That the case before the Court on the record was not one involving a decree entered upon petitioners' tax warrants, as stated by the Court in its opinion, but rather was one entered upon the legal duty and obligation of the Board of Education to account for moneys had and received by the Board of Education to the use of petitioners whose ownership of the moneys and right to receive payment thereof from the Board of Education was evidenced by the contracts of assign-

ment of that Board, called "tax anticipation warrants", which the Board had sold to petitioners. (R. 202.)

(f) That the judgment and decision of the Court denied petitioners equal protection of the law guaranteed by Section 1 of Amendment XIV to the Constitution of the United States in that the Court had declined or failed to afford to petitioners the benefit and advantage of rules of law and remedies for enforcement of their judgments which were afforded to and enjoyed by other persons and classes of persons in substantially the same position and substantially the same circumstances as petitioners. It was pointed out that such rules and principles are:

1. That a final decree entered by a court of competent jurisdiction is conclusive of the merits of the claim adjudicated by the decree and after passage of the term or corresponding requisite statutory period, a court is without jurisdiction to vacate or inquire into it on grounds other than lack of jurisdiction of the court which entered it. (R. 203.)

2. That after their decree was entered and had become final, petitioners stood in exactly the same position as any other holder of a valid, final decree against a municipal corporation, and were entitled to the benefit and advantage of the rules which render all final, valid decrees immune from collateral attack, which make such decrees sufficient in themselves to establish the corporate obligation of the municipal corporation to take all steps necessary to bring about payment thereof, and which require that full faith and credit be given to all final and valid judgments and decrees. (R. 204-205.)

3. That when a municipality, regardless of its legal character, has received moneys to the use of another and has failed to pay them to the rightful owner, such rightful owner, irrespective of the legal character of or the label placed upon the instrument by which his title to the moneys is evi-

denced, will be awarded as compensation a valid, enforceable decree or judgment against such municipality. (R. 204-205.)

The Supreme Court of Illinois denied the petition without opinion. (R. 207.)

The Questions Presented.

The following questions arise upon the record and are in issue:

1. Did the Supreme Court of Illinois fail or refuse to decide federal constitutional questions presented to it and are the non-federal grounds of decision advanced by that Court untenable or unsubstantial or of insufficient breadth to sustain the decision and judgment of the Supreme Court of Illinois in the absence of a decision of the federal questions raised by petitioners?

2. Were the rights of petitioners so prejudiced and adversely affected by the decision and judgment of the Supreme Court of Illinois as to give them the right to a review thereof by this Court on writ of certiorari, despite the fact that the judgment of the Supreme Court of Illinois dismissing the appeal of the Board of Education is on its face in favor of petitioners?

3. Did the Supreme Court of Illinois go behind the decree in the accounting suit and reconsider the questions conclusively determined by said decree and decide, because of what it regarded as lack of merit in the claims on which the decree was entered, that the decree should never have been entered, and thereby usurp judicial power and destroy the vested rights of these petitioners in their decree without due process of law and deny to petitioners the equal protection of the law?

4. Has the Supreme Court of Illinois, by its refusal to

pass upon the validity of the money decree of these petitioners, denied them their day in court on a question vital to enforcement of their property rights and so denied them due process of law?

5. Did the Supreme Court of Illinois, by its judgment, the effect of which was to release the Board of Education of its obligation to pay the decree, take the property of petitioners and give it to the Board of Education and thereby deprive them of their property without due process of law?

6. Did the Supreme Court of Illinois, by deciding that the Board of Education was not under duty to account to these petitioners for their property received by said Board to their use, which it paid out to others, permit said Board to take the property of these petitioners without compensation, thereby depriving them of their property without due process of law?

7. Did the Supreme Court of Illinois deny to these petitioners the advantages of and redress afforded by the principles of law, the presumptions and the remedies which had theretofore and have since been afforded to all other holders of judgments against Illinois municipal corporations in like circumstances and having claims substantially identical with those of petitioners, and so deny to petitioners the equal protection of the law?

8. If, as contended by petitioners, the Supreme Court of Illinois went back of the decree of the Circuit Court of Cook County, Illinois, and re-examined the propriety of the decree as respects the nature of the causes of action and the claims which the decree adjudicated and thereupon held that the decree was unenforceable because of what it regarded as lack of merit in such claims and causes of action, was such action on its part a usurpation of judicial power and were petitioners thereby deprived

of their property without due process of law and denied the equal protection of the law guaranteed them by Section 1 of Amendment XIV of the Constitution of the United States?

Reasons for Allowance of the Writ.

The judgment entered in this case, dismissing the appeal of the Board of Education from the order denying its motion to vacate the decree and dismiss the suit, is on its face in favor of the judgment holders, but since the Supreme Court of Illinois has based its judgment of dismissal of the appeal upon its judgment in *Leviton* v. *Board of Education*, 385 Ill. 599, which it says is tantamount to a decision that the money decrees of petitioners created no liability against the Board of Education and cannot be paid by the Board under the State Constitution, it has in effect reversed the judgment of the Circuit Court and vacated the decree for accounting and dismissed the suit. A decision by this Court reversing the judgment of the Supreme Court of Illinois in the *Leviton* case (*Lewis* v. *Board* in this Court) and in *People of the State of Illinois, ex rel. Reconstruction Finance Corporation, et al.* v. *Board of Education*, this day filed, with which we move that this case be consolidated, will remove the cloud upon the judgments of these petitioners and others which stand of record in the Circuit Court and the Superior Court of Cook County against the Board of Education, but we deem it necessary and proper that this Court grant the petition for writ of certiorari in this case, as representative of other cases of like status, so that it will have before it a complete picture of the litigation here involved, and that it reverse the judgment of the Supreme Court of Illinois in this case and direct that the judgment of the Circuit Court be affirmed.

The reasons for granting the petition for writ of cer-

tiorari in this case are the same as the reasons for granting the petitions in the companion cases of *People, ex rel. Reconstruction Finance Corporation* v. *Board of Education*, and *Lewis* v. *Board of Education*, and we adopt in this case in support of this petition the brief annexed to the petition in *The People, etc.* v. *Board of Education*.

Respectfully yours,

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
11 South La Salle Street,
Chicago, Illinois,
Attorneys for Petitioners.

MOTION TO CONSOLIDATE.

MAY IT PLEASE THE COURT:

This case arises out of the same fact situation and involves the same legal questions as *The People of the State of Illinois, ex rel. Reconstruction Finance Corporation, et. al.* v. *Board of Education of the City of Chicago, et al.*, this day filed, and these petitioners move that this case be consolidated with that case for hearing and decision.

Respectfully submitted,

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
11 South La Salle Street,
Chicago, Illinois,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 332

IRVING K. HUTCHINSON, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

STATEMENT BY RESPONDENT OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

RICHARD S. FOLSOM,
FRANK S. RIGHEIMER,
Attorneys for Respondent.

Of Counsel,
FRANK R. SCHNEBERGER,
JAMES W. COFFEY,

BARNARD & MILLER, 33 S. Market St., Chicago. FRAnklin 0562

INDEX.

Subject Index.

Table of Cases Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 332

IRVING K. HUTCHINSON, et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Respondent.

STATEMENT BY RESPONDENT OF MATTERS AND GROUNDS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

Respondent, Board of Education of the City of Chicago, a body politic and corporate, respectfully presents to the court the following matters and grounds making against the jurisdiction of the Supreme Court of the United States of the petition of Irving K. Hutchinson and 211 other judgment creditors of the respondent for a writ of certiorari directing the

Supreme Court of Illinois to certify to this court the record in the case of *Irving K. Hutchinson, et al.* v. *Board of Education of the City of Chicago*, No. 27490 in that court.

STATEMENT OF THE CASE

The proceeding with reference to which certiorari is sought was an appeal to the State Supreme Court by the Board of Education from an order entered in *Hutchinson, et al.* v. *Board of Education* by the Circuit Court of Cook County, Illinois, denying the motion of the defendant, Board of Education of the City of Chicago, to vacate the decree and judgments theretofore entered against the board. (R. 182) The decree and judgments were entered on April 15, 1938 (R. 133-176), the motion of the board to vacate the judgments was filed on November 19, 1942 (R. 176-182) and denied on June 7, 1943. (R. 182) No pleadings were filed by the plaintiffs in that case to said motion of the Board.

The sole question involved on the appeal was the correctness of the Circuit Court's ruling in denying the motion of the Board to vacate the decree and judgments. No demand of the plaintiffs in that case for enforcement of the decree and judgments was involved or before the court. Their sole interest in that case was the denial of the Board's motion to vacate their judgments.

The State Supreme Court, on March 21, 1944, entered an order dismissing the Board's appeal and awarding the appellees (petitioners here) their costs. (R. 197)

ARGUMENT

I.

A party successful in the State Court cannot maintain a petition for certiorari to review the judgment in his favor.

Petitioners cite no cases to support their contention that this court has jurisdiction to review the determination of the case by the State Supreme Court.

The record in this case discloses that the Board of Education was the appellant seeking to reverse an order entered by the Circuit Court of Cook County, Illinois, denying its motion to vacate the judgments entered against it in said cause. The appellees (petitioners here) were seeking to sustain the order of the Circuit Court. They sought no affirmative relief. When the Supreme Court of the State of Illinois dismissed the Board's appeal, the decree and judgments of the Circuit Court remained unchanged, the order on the motion to vacate remained unchanged and the petitioners here were the successful parties.

Under the decisions of this court a successful party cannot ask for a review of the cause by certiorari. (*Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U. S. 151, 176; *N. Y. Tel. Co.* v. *Maltbie*, 291 U. S. 645; *Lewis* v. *United States*, 216 U. S. 611, 613; *Anglo-American Prov. Co.* v. *Davis Prov. Co.*, 191 U. S. 376, 377; *New Orleans* v. *Emsheimer*, 181 U. S. 153, 154; *Public Service Com.* v. *Bashear Freight Lines*, 306 U. S. 204, 206-207.)

Respondent submits therefore that the petition for certiorari should be denied.

Respectfully submitted,

RICHARD S. FOLSOM,
FRANK S. RIGHEIMER,
Attorneys for Respondent.

Of Counsel,
FRANK R. SCHNEBERGER,
JAMES W. COFFEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 332

IRVING K. HUTCHINSON, ET AL.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI.

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

INDEX TO REPLY.

Table of Cases.

Text Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 332.

IRVING K. HUTCHINSON, ET AL.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

REPLY OF PETITIONERS TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioners, Irving K. Hutchinson, *et al.*, respectfully present to the Court their reply to the answer to the petition for writ of certiorari.

This Court has jurisdiction, power and discretion to award a writ of certiorari on application of petitioners. The case involves substantial federal questions and petitioners are entitled to invoke the judgment of this Court on the question of whether or not federal constitutional rights plainly asserted by them in apt time in the state courts have been denied or not given due recognition by those courts.

There are present in this case, as well as in the companion cases (Nos. 330 and 331), grounds which this Court has many times stated impel it to exercise its discretion to

bring before it for review the record and judgment of a state court, namely,—

1. Rights under the Constitution of the United States were plainly asserted by petitioners in the state courts in apt time at every available opportunity;

2. The federal questions raised and presented in the state courts, upon which petitioners' claims of rights under the Constitution were based, were substantial;

3. The Court either denied, or failed to give due recognition to, or failed or refused to decide the federal constitutional questions;

4. The rights claimed under the Constitution and presented to the State Court for determination were such that the case could not be determined and final judgment rendered without a decision of such claims;

5. The non-federal grounds of decision upon which the case was disposed of by the State Court were not of a character as made the decision of the federal questions unnecessary; and

6. The petitioners seeking writ of certiorari were aggrieved, prejudiced and injured by the final disposition of the case by the State Court.

Respondent does not challenge and therefore concedes that petitioners plainly presented, raised and asserted their claims under the Constitution of the United States, properly and in apt time, both in the Circuit Court of Cook County and in the Supreme Court of Illinois, and that the latter Court failed to pass upon those claims and otherwise failed to give them due recognition. (Pet., pp. 6-10.)

Respondent raises no question as to the presence in the case at bar of the first five above enumerated grounds for issuance of writ of certiorari. Its sole contention is that on the face of the record of the State Court petitioners

were the "successful" parties in that Court and, as a consequence, this Court has no power or jurisdiction to grant a writ of certiorari on an application made by petitioners.

Petitioners' reply to the proposition advanced by respondent is twofold:

1. Even assuming that any such rule of limitation upon the jurisdiction of this Court exists, this case does not come within it. Petitioners were aggrieved and injured by the decision of the Supreme Court of Illinois. The disposition of the case made by that Court was against them rather than in their favor.

2. There is no such limitation, as is asserted by respondent, upon the jurisdiction and power of this Court under § 237(b) of the Judicial Code to issue a writ of certiorari to review the record and judgment of a state court. The power and jurisdiction of this Court in that regard is in no way circumscribed or limited to cases in which the application is made by so-called "unsuccessful" parties.

We shall discuss these grounds of reply in their reverse order:

A.

The jurisdiction and power conferred on this Court by § 237(b) of the Judicial Code to grant a writ of certiorari to a state court to review a decision and judgment of such court is not limited to cases in which the application for the writ is made by one "unsuccessful" in the state court.

Section 237(b) of the Judicial Code (28 U. S. C. sec. 344(b)) confers upon this Court a broad and unlimited discretion to review on writ of certiorari any case involving issues, questions and subject matter coming within the

classes of cases set forth in the statute. The only limitation, if it may be called such, on the *jurisdiction* of this Court to issue its writ of certiorari to a state court is that the subject matter, issues or questions involved in the case of which review is sought must come within one or more of the classes of cases described in the statute.

One of the classes of cases as to which broad discretion is conferred upon this Court to permit review by it on writ of certiorari is that class of cases where, in the proceeding in the state court of which review is sought, "any title, right, privilege or immunity is specially set up or claimed *by either party* under the Constitution". (Emphasis added.) Petitioners by plain and concise statement asserted in their petition (pp. 3-10, 12, 13), that the present case comes within this class of cases. Respondent takes no issue with petitioners in this regard.

The broad discretion conferred upon this Court to issue its writ of certiorari in this class of case appears from the following language of § 237(b), which recites that—

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, *any cause* wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or *claimed by either party* under the Constitution, * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied." (Emphasis added.)

Petitioners fully appreciate and recognize that the exercise by this Court in any case of the broad discretion thus conferred upon it may and will be influenced where it

appears that the petitioners were either directly or indirectly the successful parties in the state court proceeding of which further review is sought. However, this factor has no bearing whatever upon the *jurisdiction and power* of this Court to issue a writ of certiorari in such a case, if it is of the opinion that further review is warranted.

Respondent has erred, in that it has failed to distinguish between the effect upon the jurisdiction of this Court to review *on appeal* a judgment of an inferior court where the party seeking review in this Court on appeal was successful in the court below, and cases under the certiorari statute in which the applicant is seeking to induce this Court to exercise favorably to him the broad discretion which this Court has to review *on certiorari* a judgment and record of a state court.

Each of the six decisions of this Court, which petitioners cite in support of the contention they make that "under the decisions of this Court a successful party cannot ask for review of a cause by certiorari", is a case in which review by this Court was sought by way of appeal. None of the cases involved an application for issuance of a writ of certiorari. It is well settled that the success or lack of success in the Court below on the part of the party seeking review by this Court on appeal, goes to the question of the jurisdiction of this Court to entertain the appeal. (*Robertson & Kirkham,* Jurisdiction of the Supreme Court of the United States, § 118). An appeal is a remedy which may be invoked only by an "aggrieved" party.

On the other hand the certiorari statute, (sec. 237(b), Judicial Code,) authorizes the issuance of writ of certiorari in "any cause" in which any title, right, privilege or immunity under the Constitution was specially set up or claimed in the State Court "by either party".

In each of the six appeal cases cited by respondent, the

issue of jurisdiction of this Court to entertain the cause on appeal was presented in one or the other of two ways: Either (a) the party seeking review had been successful in the court below upon the only issue, which, if it had remained in controversy, would have conferred jurisdiction upon this Court on appeal; (*Anglo-American Prov. Co.* v. *Davis Prov. Co.*, 191 U. S. 376, 377; *Public Service Comm.* v. *Brashear*, 306 U. S. 204, 206;) or (b) the disposition of the case by the court below on the merits was in favor of the appellant seeking review in this Court, and as a result appellant did not occupy in this Court the position of an "aggrieved" party, and no "controversy" was presented so as to give this Court jurisdiction. *New Orleans* v. *Emsheimer*, 181 U. S. 153, 154; *Lewis* v. *U. S.*, 216 U. S. 611, 613; *New York Telephone Co.* v. *Maltbie*, 291 U. S. 645; *Lindheimer* v. *Ill. Bell Telephone Co.*, 292 U. S. 151, 176.

These distinctions between the jurisdiction of this Court on appeal and its jurisdiction on application for writ of certiorari appear to have been recognized by this Court in the *Gold Clause* cases.* The point is not mentioned in the opinion, but this Court granted writ of certiorari to the United States Circuit Court of Appeals on petition of the United States and the Reconstruction Finance Corporation, despite the fact that the decree of which review was sought was in favor of the petitioners. Mr. Chief Justice Hughes in testifying before the Judiciary Committee of the Senate of the United States on S-2176 on March 25, 1935, said of this exercise of jurisdiction in those cases:

> "Another feature of that case was that the Government was the successful party below, and although it was the successful party below, the Court recognized the propriety of the application for certiorari, which the Court granted."

* *U. S.* v. *Bankers Trust Co.* (reported *sub nom* in *Norman* v. *B. & O. R. Co.*), 294 U. S. 240, 294, 295.

While it is true that the writ of certiorari issued to the United States Circuit Court of Appeals before that Court had taken the cases under advisement, it is submitted that the fact this Court granted certiorari indicates that it did not regard the success of the petitioners in the Court below as affecting its jurisdiction under § 240(a) of the Judicial Code to grant the petition. That section of the Judicial Code authorizes the issuance of the writ of certiorari to a United States Circuit Court of Appeals "upon petition of any party". The language of the portion of the certiorari statute applicable to petitions for issuance of the writ for review of State Court proceedings, (section 237(b), Judicial Code,) is equally broad. It authorizes the issuance of the writ of certiorari in "any cause" in which a right, title, privilege or immunity under the Constitution is specially set up or claimed in the state court "by either party".

In the *Gold Clause* cases the question of the power and jurisdiction of this Court to issue its writ of certiorari on the application of a successful party was fully briefed at pages 9-16 of the petition.

B.

Respondent, rather than petitioners, was the "successful" party in the State Court. The disposition of the case by the State Court not only impaired the rights, interests and property of petitioners, but deprived them of their property in violation of their rights under the Constitution of the United States plainly asserted and claimed by them in apt time in that Court.

Before the disposition of this case by the Supreme Court of Illinois, petitioners were possessed of a valid and enforcible decretal judgment against respondent in the Circuit Court of Cook County which stood unvacated and

unimpeached. They had the right to enforce that decree against said respondent by any means available under the laws of Illinois by which judgments and decrees against municipal corporations might be enforced. They had been successful in the Circuit Court of Cook County in their contention that no court had jurisdiction or power to review or otherwise sustain an attack upon their decree on any ground other than lack of jurisdiction on the part of the Circuit Court of Cook County to enter the decree; that such decree was property protected by the Constitution of the United States; and that to deny them the right to enforce said decree by any appropriate or available means provided by the law of Illinois for the enforcement of judgments and decrees against municipal corporations, would destroy the decree, render it a mere scrap of paper, and deprive petitioners of their vested property rights in their decree without due process of law. These contentions were reasserted in the Supreme Court of Illinois, Pet., p. 6.

That Court, applying to petitioners its decisions in two prior cases, (*Leviton* v. *Board of Education*, 374 Ill. 594, 30 N. E. (2d) 497, and 385 Ill. 599, 53 N. E. (2d) 596,) to neither of which petitioners were parties, but which involved a decree against respondent similar to petitioners' decree, held that the essential issues in the case at bar had been determined adversely to petitioners in the prior cases. In particular, it held it had determined in the prior cases that decrees against the respondent of the character involved in the case at bar, created no liability against the respondent, that under the Illinois Constitution the respondent could not pay such decrees voluntarily or be compelled to do so by judicial process normally available for the enforcement of judgments and decrees against respondent (R. 193), and that the essential issues respecting the enforcibility against the respondent of the decree held by the petitioners having been adjudicated in the prior

cases adversely to petitioners, the case was rendered moot "since no effective relief could be granted to either party on the questions raised" (R. 196).

This disposition of the case by the Supreme Court of Illinois materially changed petitioners' position, prejudiced their rights and interests, destroyed their decree and deprived them of their private property rights which their decree had adjudicated favorably to them. The petitioners are in the anomalous position of having a decretal judgment of record against respondent which no court has jurisdiction to vacate, and which has not been held to be invalid, but which no court in Illinois will undertake to enforce against respondent in the face of the decision of the Supreme Court of Illinois. The life and core of the decree and judgment have been taken from petitioners, leaving but an empty shell.

Petitioners were further prejudiced in that their claims, —(a) that their decree and their private property rights adjudicated in their favor by such decrees were protected by the Constitution of the United States against impairment and attack and prejudice by any person or any court on grounds other than ones involving the jurisdiction of the Circuit Court of Cook County to enter the decree in the first instance, and (b) that the right of petitioners to judicial process to enforce the decree against respondent, which was the life of the decree, was likewise so protected, —were not passed upon or even alluded to in the opinion of the Supreme Court.

Aside from all other factors, when it is considered that the respondent has been relieved of all obligation on its part to pay or to have enforced against it the money decree of petitioners, it would appear no argument is necessary to demonstrate that respondent was benefited materially by the judgment and decision of the Supreme Court of

Illinois and that petitioners, on the other hand, were and continue to be materially aggrieved.

It is held by this Court in *Love* v. *Griffith*, 266 U. S. 32, 33, as well as in many other cases,* that when, as here, there has been a plain assertion of federal rights in the state court, the parties asserting those rights are entitled to have them judicially determined, and that whether the rights were denied or were not given due recognition or were otherwise ignored by the state court is a question as to which the parties who asserted such rights are entitled to invoke the judgment of this Court. In that case this Court stated that it will look to the case as it stood before the Court of first instance, and if it appears that substantial questions of federal constitutional rights were involved, then this Court will "be astute to avoid hindrances in the way of taking it up". While that case was before this Court on writ of error, the principle announced would seem to apply with even greater force to a case, such as that at bar, in which review is sought on petition for writ of certiorari where the only question presented is whether this Court should in its discretion grant the prayer of the petition.

The holding of the Supreme Court of Illinois that the case was moot was not a non-federal ground of decision which rendered unnecessary the decision of the federal questions. The dismissal of the appeal of the respondent on the ground that the issues of the case had become moot was not based upon any claim that any event such as payment or release of error or vacation of the judgment, had taken place pending the appeal so as to end the controversy between petitioners and respondent. It was based solely on the ground that the Court had, in two other cases involving a decree against respondent other than, but sub-

* Petition in *People* v. *Board*, No. 330, pp. 12-18; Brief, pp. 48-52.

stantially identical with, petitioners' decree, decided in favor of respondent on the issue of respondent's power to pay such a decree and the judgment creditor's right to compel enforcement of such a decree, and that since those decisions effectively disposed of the same questions presented in the case at bar, it would serve no good purpose formally again to pass upon them in the case at bar. The Court thereupon dismissed the case as moot. (R. 196.)

This was a decision against petitioners and in favor of the respondent on the merits, and the fact that the appeal of respondent was dismissed does not bar petitioners from exercising their right to invoke the judgment of this Court on the question whether the Supreme Court of Illinois denied or failed to give due recognition to federal constitutional rights plainly asserted by petitioners in that Court. *Love* v. *Griffith*, 266 U. S. 32, 33.

Petitioners therefore respectfully renew the prayer of their petition for issuance by this Court to the Supreme Court of Illinois of a writ of certiorari to review the decision and judgment of that Court.

Respectfully submitted,

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.

(37)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 332

IRVING K. HUTCHINSON, ET AL.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

PETITION OF IRVING K. HUTCHINSON, ET AL., FOR RECONSIDERATION OF THEIR PETITION FOR WRIT OF CERTIORARI.

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
11 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 332.

IRVING K. HUTCHINSON, ET AL.,
Petitioners.

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Respondent.

PETITION OF IRVING K. HUTCHINSON, ET AL., FOR RECONSIDERATION OF THEIR PETITION FOR WRIT OF CERTIORARI.

To The Honorable The Supreme Court of the United States:

Irving K. Hutchinson and others, judgment creditors of the Board of Education of the City of Chicago, respectfully pray that this Honorable Court reconsider their petition for writ of certiorari, that it set aside its order of October 9, 1944, denying said petition, and that it award the writ of certiorari as prayed in said petition.

We respectfully submit that

(1) rights and interests under the Constitution of the United States were duly claimed and duly asserted by the petitioners in the state courts, as set forth in the petition at pages 5-10;

(2) the federal constitutional questions presented and the constitutional rights claimed were substantial, as presented in the petition at pages 10-12;

(3) the claims of rights and interests under the federal Constitution urged by petitioners were not decided or given due recognition by the Supreme Court of Illinois, as appears from an examination of its opinion (R. 185-196) and of the petition for rehearing (R. 200-206); and

(4) the non-federal grounds upon which the Supreme Court of Illinois based its decision are untenable and unsubstantial and are not independent of the claims of petitioners under the federal Constitution so that the rights and interests of petitioners can be adjudicated without a decision of the federal constitutional questions.

We respectfully submit that the Supreme Court of Illinois in dismissing the appeal arbitrarily denied to these petitioners their day in court. Whether the rights and interests of petitioners can be adjudicated without a decision of the federal questions asserted by them is in itself a substantial federal question which should move this Court to exercise its judicial discretion to bring the case up for review. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282; *Ward* v. *Love County*, 253 U. S. 17, 22; *Kansas City Southern Ry.* v. *Albers Commission Co.* 223 U. S. 573, 591-594; *C. B. & Q. Ry.* v. *Drainage Comrs.* 200 U. S. 561, 580; *Rogers* v. *Alabama*, 192 U. S. 226, 230.

Respondent, by its answer, does not challenge, and so it must be assumed that it concedes, that the grounds stated in the petition, which this Court has often stated impel it to exercise its discretion to award its writ of certiorari to bring before it for review the judgment and record of a state court, are present in this case. The only ground of opposition to the petition stated in the answer is that petitioner was successful in the state court. We think we

have demonstrated in our reply to the answer that this ground is not well taken. The jurisdiction and power conferred on this Court by Section 237(b) of the Judicial Code to grant a writ of certiorari to a state court to review the decision and judgment of such court is not limited to cases in which the application for the writ is made by one "unsuccessful" in the state court. (Reply, pp. 3-7.) Furthermore, the effect of the decision of the Supreme Court of Illinois is to deprive petitioners of their property in their decrees without due process of law in violation of the Fourteenth Amendment. Reply, pp. 7-11.

The issues in this case are substantially like the issues in No. 330, *People ex rel. Reconstruction Finance Corp. et al.* v. *Board of Education of the City of Chicago, et al.*, with which petitioners have moved that this case be consolidated, and they respectfully refer to the petition for reconsideration in that case for additional support for this petition.

Respectfully submitted,

FLOYD E. THOMPSON,
ALBERT E. JENNER, JR.,
Attorneys for Petitioners.

CERTIFICATE.

We certify that the foregoing motion for reconsideration of Petition for Writ of Certiorari is presented in good faith and not for delay.

Floyd E Thompson

Albert E Jenner Jr